A.J. Mechanical, Inc., William A. Greene a/k/a Arnold Greene and Cynthia D. Greene *and* Carpenters and Millwrights, Local Union #2471, affiliated with United Brotherhood of Carpenters and Joiners of America. Cases 15–CA–15350, 15–CA–15388, 15–CA–15598, and 15–CA–15618

July 23, 2008

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

Procedural History

On April 14, 2000, in the underlying unfair labor practice proceeding, the National Labor Relations Board found that the Respondent A.J. Mechanical, Inc. (A.J. Mechanical) violated Section 8(a)(1), (3), and (5) of the Act in various respects and ordered the Respondent to make certain employees whole.[1]

During the subsequent compliance proceedings, the parties disputed the amount of backpay due under the Board's Order. In addition, by the time of the compliance proceeding, the Respondent's principal shareholders, William A. (Arnold) Greene and James Sanders, had dissolved A.J. Mechanical and distributed the corporate assets to themselves. Consequently, the General Counsel sought to pierce the corporate veil and, as relevant here, impose personal liability on Arnold Greene and his wife, Cynthia D. Greene, for A.J. Mechanical's backpay obligations.[2]

The administrative law judge found that A.J. Mechanical owed backpay to the employees in the amounts alleged in the compliance specification. In addition, applying *White Oak Coal*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996), which sets forth the two-prong test for determining whether the Board should pierce the corporate veil and find a party personally liable, the judge imposed personal liability on Arnold and Cynthia Greene.

On August 26, 2005, the Board issued a supplemental decision, addressing the parties' exceptions to the judge's decision in the compliance proceeding.[3] The Board adopted the judge's findings regarding the amount of backpay the Respondent owed to the discriminatees, but reversed the judge's decision to pierce the corporate veil and impose personal liability for backpay on the Greenes.

The Board filed with the United States Court of Appeals for the District of Columbia Circuit an application for enforcement of its supplemental decision, affirming the backpay judgment against the Respondent. The Charging Party-Union cross-petitioned the court for review of the Board's refusal to pierce the corporate veil and impose personal liability on the Greenes. On March 16, 2007, the court summarily enforced the uncontested backpay judgment against Respondent A.J. Mechanical, but granted the Union's petition for review. The court vacated the Board's decision insofar as it had refused to pierce the corporate veil and remanded the case to the Board for further proceedings.[4]

In the court's view, the Board failed to cite evidence sufficient to support the findings on which it based its refusal to pierce the corporate veil. Specifically, the court found that the scope and nature of the unfair labor practices were such that Greene would have foreseen possible financial consequences for the Respondent resulting from such actions, even before charges were filed. Further, the court found insufficient support for the Board's conclusion that the decision to terminate A.J. Mechanical's operations preceded the commencement of extraordinary shareholder distribution payments in February 1999. The court thus found inadequate support for the Board's conclusion that the shareholder distribution payments that began in February 1999 were made pursuant to a previous, legitimate determination to dissolve the corporation. Having found that the Board failed to set forth an adequate evidentiary basis to support its conclusion that the second prong of *White Oak Coal* had not been met, the court set aside that portion of the Board's Order and remanded the case to the Board for further proceedings.[5]

[1] 330 NLRB No. 178 (not reported in Board volumes). Respondent A.J. Mechanical failed to answer the complaint, and the Board granted summary judgment. On October 23, 2000, the United States Court of Appeals for the Eleventh Circuit issued an unpublished judgment enforcing the Board's Order in full.

[2] In a series of payments beginning in February 1999, the financial assets of A.J. Mechanical were distributed to its two shareholders, Arnold Greene and James Sanders. The company ceased operations in September 1999 and, in June 2000, the Respondent's corporate existence was formally dissolved. In February 2002, Sanders and his wife entered into a settlement agreement with the Board holding them harmless against personal liability for backpay in exchange for a payment of $112,500. In October 2002, Arnold and Cynthia Greene were named individually as Respondents.

[3] 345 NLRB 295.

[4] *Carpenters & Millrights Local 2471 v. NLRB*, 481 F.3d 804 (D.C. Cir. 2007).

[5] Upon remand and in response to the Board's request for statements of position, the Respondents resubmitted the exceptions and supporting brief that they filed with the Board in 2003, as well as a cover letter asserting that their due process rights had been prejudiced. The due process argument stems from the 2002 compliance specification. In response to that specification, the Greenes moved for a continuance of

Having accepted the court's remand as the law of the case, we now reexamine application of the *White Oak Coal* test consistent with the court's findings.[6] As more fully explained herein, doing so, we find that the corporate veil should be pierced and personal liability imposed on both Arnold and Cynthia Greene.[7]

Analysis

Pursuant to *White Oak Coal*, supra, the Board will pierce the corporate veil when: (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct; and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

A. Prong One

Under the first prong of the *White Oak Coal* test, which the Board assumed to be satisfied in its prior decision, the factors to be considered are the degree to which corporate legal formalities were maintained and the degree to which individual and corporate funds, other assets, and affairs were commingled.[8] Specifically, the Board examines: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of same, or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes; and (9) transfer or disposal of corporate assets without fair consideration.[9]

The record evidence demonstrates that the principals of A.J. Mechanical disregarded corporate formalities and structure with respect to a variety of procedural and operational practices. In this regard, the Respondent's principals failed to keep adequate records on corporate structure, operation, and finances. As to corporate structure, the record shows that Arnold Greene and James Sanders formed A.J. Mechanical in 1993.[10] Aside from a 2-page document entitled "Joint Special Meeting of the Board of Directors and Shareholders," reflecting the decision by Greene and Sanders to dissolve the corporation, along with a "Statement of Intent to Dissolve," both dated December 2, 1999, there is no evidence that any formal board or shareholder meetings were held at any other time during A.J. Mechanical's existence. In addition, while Greene testified that by laws for A.J. Mechanical had been drawn up, he did not produce them nor could he recall where they might have been kept or were currently located.

Regarding operations, the Respondent's principals only loosely adhered to corporate formalities with respect to business decisionmaking. Although the record indicates that Greene and Sanders may have discussed major issues, they did not document the process or record these discussions. In addition, there is no evidence that corporate decisions were the result of mutual consultations and decisions by the two-member corporate board. Instead, for the most part, Greene and Sanders each oversaw individual projects independently and simply kept each other informed.

Further, regarding the documentation of corporate finances, the record establishes that Greene made loans to the corporation from his personal accounts. However, there is no evidence that the loans adhered to accepted commercial or business standards regarding terms for repayment or interest. Specifically, there appears to have been no loan agreements, promissory notes, or paperwork of any type documenting what the loan was for or its terms.

Thus, aside from the initial incorporating documents and the final papers marking its dissolution, the Respon-

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the scheduled October 30, 2002 compliance hearing, asserting that 28 days was insufficient time to prepare their defense and that their counsel had scheduling conflicts. The Board's associate chief administrative law judge denied the motion, citing a failure to establish the particulars of the Greenes' hearing preparation difficulties and counsel's scheduling conflicts, and he also denied the subsequent motion for reconsideration of this ruling. The Greenes appeared at the hearing on October 30 with substitute counsel who moved for a continuance, asserting his unfamiliarity with the case and the Greenes' October 28, 2002 bankruptcy filing. The judge granted counsel the opportunity to contact the Greenes' bankruptcy attorney regarding the impact of a proposed settlement. The counsel declined the judge's offer. In these circumstances, we find that the Respondent has not established that the judge abused his discretion by denying the continuance motion or otherwise violated the Respondents' due process rights.

[6] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[7] We have corrected certain inadvertent errors in the judge's proposed Order to properly reflect the amount of backpay due certain individuals.

[8] *White Oak Coal*, supra at 735, citing *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1983).

[9] Id.

[10] A copy of A.J. Mechanical's articles of incorporation, filed January 29, 1993, was submitted into the record.

dent's principals failed to keep adequate records of corporate structure, operations, decisionmaking, and financial transactions.

In addition, the record demonstrates that the principals of A.J. Mechanical improperly commingled personal and corporate assets and property. While there is no documentation to verify the amount of the corporation's initial capitalization,[11] the judge found that it was undercapitalized from its inception, which necessitated loans from the principals to pay even basic corporate obligations. The judge's finding in this regard is supported by the fact that, on an unspecified number of occasions, the Greenes made the above-mentioned informal, undocumented loans to the corporation from their personal accounts to satisfy payroll obligations and other operating expenses.[12]

Further suggestive of the blended identities of the corporation and its principals is that there was little distinction between personal and corporate property. In this regard, Arnold and Cynthia Greene's home served as A.J. Mechanical's primary office and mailing address.[13] The Greenes also shared their home telephone and fax numbers with the business and occasionally stored company equipment on their residential property. In addition, the corporation paid for Arnold Greene's leased vehicle, which he drove almost exclusively, on a daily basis, asserting that "I worked all the time." This admission further suggests that Greene did not consciously separate his business and personal interests.

Finally, the record establishes that the principals transferred corporate assets to themselves without fair consideration. Although the principals did not decide to dissolve the corporation until December 1999, Greene and Sanders each received over $1,800,000 in shareholder distributions from the corporation in the year before the dissolution. There is no evidence suggesting that these distributions were for valid corporate purposes or represented fair consideration.

Thus, Greene and his wife, Cynthia, engaged in a casual sharing of property between themselves and the corporation. In addition, without following minimal accounting procedures or accepted business practices, the Greenes engaged in substantial financial transactions with the corporation, commingling personal and corporate assets.

Based on the foregoing, we find a sufficient unity of interest and lack of respect for the separate identity of the corporation and its shareholders to conclude, as the Board assumed in its initial decision, that the personalities and assets of A.J. Mechanical and the Greenes are indistinct, and that the first prong of *White Oak Coal* has been satisfied.[14]

B. Prong Two

Under the second prong of *White Oak Coal*, we must determine whether adhering to the corporate form and not holding the Greenes liable for backpay would permit a fraud, promote injustice, or lead to an evasion of legal obligations. In this regard, the showing of inequity must flow from the misuse of the corporate form, and the individuals charged personally must be found to have participated in the fraud, injustice, or inequity. *White Oak Coal*, supra at 735.

Having accepted the court's decision as the law of the case, we must analyze the second prong in light of the court's rejection of the evidence previously cited by the Board in finding that the second prong had not been satisfied. Doing so, we find that the remaining record evidence supports the conclusion that adherence to the corporate structure would unjustly result in the evasion of A.J. Mechanical's backpay obligations, and that the Greenes should be held personally liable for those obligations.

Arnold Greene owned half of the corporation, held the title of president, and was a member of the board of directors. He played a hands-on role in the daily operation

[11] Greene testified that there was no documentation as to those initial payments and that he could not remember the exact amount of their contributions, but that he was sure that he and Sanders provided the same amount, estimated as "somewhere around $20,000." The Board adopted the judge's findings discrediting Greene except where his testimony was otherwise corroborated or constituted an admission against interest. We find that Greene's testimony regarding the lack of adherence to formal business practices and the casualness of his relationship with A.J. Mechanical from the very beginning may fairly be characterized as an admission against interest.

[12] For example, Cynthia Greene described a July 12, 1999 check she had signed, in her bookkeeping role, on Respondent A.J. Mechanical's account in the amount of $46,000, payable to Arnold Greene, as repayment with interest, to herself and her husband, for a loan they had jointly made to the company. Cynthia could not identify what the particular loan was for, describing it only as "probably a credit card bill" and that she "thought" her husband told her to make the interest rate 8 percent. Describing the procedure for making the loan, Cynthia testified, "so we went to our bank, used our credit card, basically, to get money so we could make payroll or whatever the reason was. Then when the money in the account got back up we repaid ourselves . . . we were shuffling our money to make payroll."

[13] While the Greenes' residence was the corporation's primary office, Sanders testified that at various times the corporation also listed his home address as its own.

[14] In the Board's prior decision, Chairman Schaumber noted that, due to the small, closely-held nature of the corporation, it was not surprising that the Respondent's principals did not rigidly observe corporate formalities. However, after full consideration of the evidence, he agrees that the principals failed to adhere to virtually any corporate formalities and improperly blurred the line between personal and corporate assets satisfying prong one. Accordingly, Chairman Schaumber agrees that prong one has been satisfied.

of the business, not only making decisions about the work that the company would undertake, but also directly participating in and overseeing its performance. He personally committed a number of serious unfair labor practices. And it was he (along with co-owner Sanders) who decided to cease operations, sell the corporate assets, and transfer substantial funds from A.J. Mechanical into his personal holdings. Thus, he clearly played an active role in the corporation and the diversion of its assets to his direct personal benefit.

Cynthia Greene also played an active role in the corporation and participated in and benefited from the diversion of A.J. Mechanical's assets. While Cynthia did not work in a paid position for A.J. Mechanical at the time of the events in this case, she regularly performed uncompensated bookkeeping and clerical duties for the business. In this capacity, she was authorized to write checks on the corporation's checking account to pay bills. In addition, after she and her husband extended their jointly-held credit to A.J. Mechanical's use, her signature authorized repayment to her husband and herself, with interest, through a check written on the corporate account. Thus, while Cynthia's day-to-day role in the corporation's operation was less significant than her husband's, she nevertheless was knowledgeable of and played an important function in the handling of A.J. Mechanical's finances.

Cynthia also played a direct and substantial role in the dissipation of the corporation's assets. She wrote three shareholder distribution checks during 1999, payable to Arnold Greene, among them the single largest shareholder distribution payment of $500,000.[15] Added together, those three checks accounted for over $800,000 in A.J. Mechanical's funds that would otherwise been available to satisfy its backpay liability. Although Cynthia testified that she wrote those checks at the direction of her husband, it is clear from the record that Arnold placed those funds directly into an account he held jointly with Cynthia. And, as has been maintained by both Arnold and Cynthia Greene, they shared all assets equally, throughout the course of their marriage.[16] Thus, Cynthia Greene's signature authorized the transfer of corporate funds to her husband that inured directly to their mutual personal benefit.

We contrast the evidence regarding Cynthia Greene with that concerning two individuals on whom the Board declined to impose personal liability in *SRC Painting, LLC,* 346 NLRB 707 (2006), finding that they (unlike four other family members) had played no active role in any of the respondent corporations—i.e., "[t]hey did not even perform routine clerical functions."[17]

The Board explained:

> . . . a person's passive receipt of benefits that derive from a diversion of corporate assets for noncorporate purposes does not, by itself, demonstrate participation in the fraud, injustice, or inequity sufficient to establish individual liability under the second prong of the *White Oak* analysis [citations omitted]."[18]

By contrast, Cynthia Greene's conduct amounted to more than "passive receipt of benefits." She both played an active and ongoing role in the corporation and also participated in the dissipation of its assets for noncorporate reasons.

In summary, Arnold and Cynthia Greene blurred the separate corporate identity of A.J. Mechanical with their personal identities and misused the corporate assets and form, particularly by transferring significant amounts of the assets of the corporation to themselves for personal gain, without fair consideration. These actions foreseeably resulted in the corporation's diminished ability to satisfy its statutory remedial obligations. Accordingly, we find that the second prong of the *White Oak Coal* test has also been satisfied, and that there is sufficient basis to pierce the corporate veil and hold both Arnold and Cynthia Greene personally liable for A.J. Mechanical's outstanding backpay obligations.

ORDER

The Respondents William A. Greene and Cynthia D. Greene shall make whole the following individuals by paying each of them the sum of money set forth opposite their names, plus interest minus tax withholdings, if any, required by Federal and State laws:

James R. Adams	$ 14,828.97
Darryl L. Henderson	9,605.00
Eddy Lee Jordan	10,014.04
William G. Krajewski	7,942.46
Jeremy P. McCall	4,789.00
Ronald W. Morrell	11,423.99
David J. North	12,055.60
John P. Schifko	10,726.93

[15] Cynthia Greene's authorizing signature appears on checks, payable to Arnold Greene, in the amounts of $100,000 on April 13, 1999, $500,000 on June 10, 1999, and $217,500 on November 4, 1999.

[16] In this regard, Cynthia and Arnold Greene were emphatic and mutually corroborative. Each of them admitted that throughout the course of their marriage (approximately 16 years at the time of the supplemental hearing) they held all their assets jointly. Arnold Green stated that he regularly deposited money received from the business, including the 1999 shareholder distribution checks, into the joint checking account he held with his wife. He stated further that when he took funds from that account to make purchases or other investments, those assets, too, were held jointly with Cynthia Greene.

[17] 346 NLRB at 708.

[18] Id.

Scottie B. Steele	5,728.40
Frank Tournabene	6,072.00
Matthew R. Weaver	15,201.41
Garry B. West	$ 15,567.60

The Respondents William A. Greene and Cynthia D. Greene shall make whole the following individuals by paying each of them the sum of $2,992.00, plus interest minus tax withholdings, if any, required by Federal and State laws:

Abernathy, Jerry	Graham, Luther
Adams, Timothy E.	Graham, Marvin
Baker, James B.	Grantland, John
Baker, Jason L.	Green, Ronald A.
Barahona, Rolando L.	Hall, Michael W.
Best, Tracey C.	Harper, Michael C.
Black, Joel L.	Harrelson, Cecil Jr.
Bradshaw, Randall S.	Harrison, Robert D.
Brooks, Byron S.	Hawthorne, James L.
Cameron, Andrew	Henriquez, Juan F.
Caraway, Robert B.	Hicks, Kenneth S.
Carnley, James C.	Hill, Marshal D.
Carnley, Sherral P.	Holley, Junior
Chessher, Jerry D.	Jackson, Darryl J.
Chessher, Terry L.	Johnson, Glen Jr.
Cleary, William R.	Joiner, Charles W.
Cooey, Clay W.	Judson, Shane P.
Copeland Barry E.	Kirchharr, James E.
Cowart, Douglas R.	Knight, James E.
Crow, Terry C.	Lambert, Raymond T.
Davidson, Wade N.	Land, W. Roger
Davis, Diane W.	Lazar, Harry J.
Dick, Richard J.	Lee, James. H.
Durdin, Quillie	Lee, Roger M.
Ellis, Pamela A.	Lee, Ronald W.
Evans, Marcus D.	Lukkar, Mark T.
Ford, Christopher	Madden, Stephen
Foster, Aaron D.	Mason, John W.
Maxson, Dennis. M.	Rodrigues, Julio Ceasa
Mayton, Deborah L.	Scarborough, Daniel E.
Miller, George M.	Schachle, Vincent C.
Millins, Phillip O.	Shachle, Paul F.
Millwood, Robert M.	Shields, Douglas A.
Mosley, Ronald R.	Steeverson, Gregory J.
Nguyen, Su Van	Stough, David A.
Nichols, Christopher S.	Stroud, Robert K.
Nix, Randall S.	Taylor, Paul
Nunnally, Patrick E.	Tyra, Ron
Nunnally, Troy A.	Vick, Armon R.
Odom, Curtis L.	Walker, Christina J.
Odom, Jakie E.	Walker, Lisa M.
Owen, Cecil R.	Walker, Michael
Pedicord, Brian K.	Ward, Ivy
Pennington, David E.	Ward, Tim
Petty, Jimmy D.	Whitson, Carl R.
Phillips, Donald W.	Williams, Clinton S.
Phillips, Douglas W.	Williams, Donald
Phillips, Gail A.	Willis, James R.
Phillips, Jason C.	Wolfe, Theodore D.
Raines, Mary R.	Woods, Kelly B.
Revill, Charles W.	Wynn, Edward L.
Roberts, Glenn	Young, Cornelius L.

The Respondents William A. Greene and Cynthia D. Greene shall make whole the flowing individuals by paying them the sum of money set forth opposite their names, plus interest minus tax withholdings, if any, required by Federal and State laws:

Brumley, Bradley S.	$1,760
Maddox, Frankie	3,604

Dated, Washington, D.C. July 23, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD